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Supreme Court, U. S.
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No. 177

In the Supreme Court of the United States

OCTOBER TERM, 1932

C. V. SORRELLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury appears at R. 21–22. The majority and dissenting opinions in the Circuit Court of Appeals (R. 31–48) are reported in 57 F. (2d) 973.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 15, 1932. (R. 49.) The petition for certiorari was filed June 27, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to direct the jury to acquit petitioner upon the ground that he had been entrapped into making the sale of liquor upon which the indictment was based.

2. Whether the trial court erred in instructing the jury that the evidence did not show entrapment.

3. Whether the trial court erred in refusing to give certain requested instructions upon the subject of entrapment.

4. Whether the trial court erred in admitting in evidence, over petitioner's objection, testimony as to like offenses committed subsequent to those charged in the indictment.

STATEMENT

An indictment in two counts was returned against petitioner in the District Court for the Western District of North Carolina charging the possession and sale of one-half gallon of whisky on July 13, 1930, in violation of the National Prohibition Act. (R. 1–2.)

Petitioner's sole defense at the trial was that of entrapment. To prove the charges contained in the indictment the Government called as witnesses two Federal prohibition agents, Martin and White. The purchase upon which the indictment was based was made by Martin. He testified that on Sunday, July 13, 1930, he visited petitioner's home and "in consequence of a conversation had with the defendant the defendant went off and returned shortly

with a half-gallon of liquor for which the witness paid defendant the sum of $5.00." (R. 7.) Upon cross-examination Martin explained that this purchase was made under the following circumstances (R. 8–9):

> That he visited the home of the defendant on July 12th, 1930, at which time the defendant was not at home and that he made such trip in company with two or three young men who were residents of the community in which the witness was temporarily staying. That on Sunday afternoon, July 13th, 1930, the witness again visited the home of the defendant, accompanied by Fanning Lowe, E. D. Jones and C. J. Snyder. That upon their arrival at the home of the defendant the witness was introduced to the defendant by Fanning Lowe the witness being introduced as a resident of Charlotte, N. C., and a tourist stopping for the time being at Clyde, N. C. That the witness had a considerable conversation with the defendant, lasting between fifteen and thirty minutes and that during the conversation the witness ascertained that the defendant was a veteran of the World War and a former member of the 30th Division A. E. F. That the witness informed the defendant that he, the witness, was also an ex-service man and was also a former member of the 30th Division A. E. F., which in reality was the truth. That the witness asked the defendant if he, the defendant, could get him, the witness, some liquor and that at first the defendant

stated that he did not have any liquor. That later in the conversation the witness again asked the defendant if he, the defendant, could get him, the witness, some liquor and that there was further conversation between the two relative to the securing of some liquor. That at the time of such conversation one of those present, to-wit, E. D. Jones, was also an ex-service man and a former member of the 30th Division A. E. F. and some conversation was had between all present relative to the war experiences of the witness, the defendant and E. D. Jones. That the witness a third time asked the defendant to get him, the witness, some liquor and thereupon the defendant left his home and was gone a few minutes and came back with a half-gallon of liquor for which the witness paid the defendant the sum of $5.00. That the witness was the first and only person among those present at the time who said anything about securing some liquor and was the first person to mention the subject. That the witness at the time he asked the defendant to secure some liquor for him, the witness, did so with the express view and purpose in mind to indict and prosecute the defendant for procuring and selling the liquor and that such was the purpose of the witness when he went to the home of the defendant and procured the liquor.

Martin also testified, on direct examination, over objection, that in August he accompanied agent White to petitioner's home to purchase another

half gallon of whisky (R. 7), and White testified that petitioner sold him the whisky for $6, and said he "would guarantee it would be all right." (R. 5.) White also testified that two weeks later, in company with Martin and another man, he searched the premises around the petitioner's house and found eleven one-half gallon fruit jars full of whisky in a thicket about 100 yards below the house, and a ten-gallon keg containing between three and four gallons of wine in a field just above the house. (R. 5–6.) This search, White later testified, was made pursuant to a search warrant. (R. 17.)

Petitioner moved that the testimony of White and Martin with reference to the transactions occurring in August be stricken from the record upon the ground that they related to offenses subsequent to those charged in the indictment. This motion was overruled and petitioner noted an exception. (R. 6–7, 8.)

Among others, the petitioner called as witnesses the three men who either accompanied Martin or were present when Martin made the purchase of July 13th. (R. 9–14.) Their testimony was summarized in the dissenting opinion in the court below as follows (R. 46–47):

> The agent was accompanied by three young men, residents of the community. One of them introduced him to Sorrells as a furniture dealer from Charlotte, on a vacation, who was desirous of procuring some good

whisky. The agent asked Sorrells to get it; but he said that he did not have any whisky and that he did not fool with it. The agent and his associates nevertheless remained at the house for an hour and a half and during this interval, it transpired that Sorrells and the agent and one of the others had served in the same division of the American Army during the Great War. Their experiences in the war were discussed; and during the conversation, the agent asked Sorrells three or four times to get some whisky, but each time was met with the same response as at first. The request was again renewed, and finally Sorrells said that he would go and see if he could get some. He left his home and was gone from twenty to thirty minutes, returning with a half gallon of whisky which he delivered to the agent in exchange for the sum of $5.00.

One of these witnesses testified that he knew that petitioner had been employed by a wood fibre company at Canton, North Carolina, since 1924, and that he saw petitioner at work there practically every day. (R. 11.) This testimony was corroborated by the time-keeper and assistant paymaster of the company, who testified that petitioner had been "on his job continuously without missing a pay day since March, 1924." (R. 11–12.)

Neighbors of petitioner, who had known him for a number of years, testified that he bore a good reputation in the community. (R. 9–15.)

To rebut this testimony the Government called a number of witnesses who testified that petitioner had the general reputation of being a rum runner. (R. 17–20.) There was no direct evidence that the agent Martin had any knowledge that the petitioner had dealt in liquor prior to his first purchase from the petitioner on July 13, 1930. (R. 17.)

The record discloses no prior conviction of petitioner under the National Prohibition Act or any State liquor law.

Motions for a directed verdict were made by petitioner at appropriate intervals during the trial. These motions were denied and exceptions noted. (R. 9, 15, 20.)

Petitioner also presented certain requests for instructions on the subject of entrapment. (R. 20–21.) These were refused and an exception taken. (R. 20.) The trial judge charged the jury that as a matter of law the evidence did not show that petitioner was induced or entrapped to sell liquor. (R. 22.) Petitioner excepted to this charge (R. 22), and the jury returned a general verdict of guilty. (R. 4, 22.) After the denial of motions in arrest of judgment and to set aside the verdict, petitioner was sentenced to 18 months in the penitentiary. (R. 4, 22.)

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment of conviction was affirmed, one judge dissenting. (R. 31–49.)

DISCUSSION

We do not oppose the granting of the petition in this case. As indicated in the dissenting opinion (R. 43–48), the majority opinion narrows the doctrine of entrapment as enunciated by the court below in its earlier opinion in *Newman* v. *United States,* 299 Fed. 128, and as expressed with substantial unanimity by practically all of the other Circuit Courts of Appeals. (See list of cases collated in dissenting opinion, R. 44.) If the doctrine is correctly stated in the other Circuit Courts of Appeals, the defense of entrapment in this case raised issues which should have been submitted to the jury under appropriate instructions. From the circumstances under which the sale of July 13, 1930, was made, the finding of liquor on the premises, the subsequent sale, and the conflicting testimony as to petitioner's reputation in the community, the jury might have inferred that the defendant, being furnished an opportunity which he regarded as reasonably safe, was not unwilling to violate the law, and that he was not an innocent man induced and persuaded to commit the crime by officers of the law. But such questions, if material, were open upon this record as questions of fact.

Whichever view as to the scope of the defense of entrapment is right, the question, as stated in *O'Brien* v. *United States,* 51 F. (2d) 674, 677 (C. C. A. 7th), is "arising with ever increasing frequency in criminal cases involving prosecutions

under the National Prohibition Act." Proper enforcement of the criminal laws requires that there be no substantial divergence of views on the subject among the Circuit Courts of Appeals. The question of entrapment involves important considerations of public policy which affect the Government and its citizens, and we believe that the questions presented in this case are of sufficient general importance to justify review by this Court. The subject was last dealt with by this Court in *Casey* v. *United States*, 276 U. S. 413, but the majority opinion points out that the record in that case was not particularly designed to present the question, and the Court did not lay down a rule in that case which has been regarded by the Circuit Courts of Appeals as establishing the limits of the defense of entrapment.

Respectfully submitted.

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AUGUST, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932